

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.12.2004

CORAM:

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

CRIMINAL REVISION CASE NO.734 OF 2004

State by Inspector of Police,
CBI/ACB/Chennai.

Petitioner / Complainant

Vs.

1. S.Sankaran

2. K.V.Raviprasad

Respondents / Accused 1,2

Criminal Revision Case filed under Sections 397 and 401 of
Cr.P.C. as stated therein.

For Petitioner: : Mr.N.Chandrasekaran,
Govt.Advocate (Crl.side)

For Respondents: : Mr.S.Ravindran -R1.

No appearance folr R2.

O R D E R

The above Criminal Revision case has been filed by the
State against the order dated 14.11.2003 made in Crl.M.P.No.381 of
2003 in C.C.No.40 of 1998 by the Court of Principal Special Judge
for C.B.I. Cases, Chennai.

2. The case of the petitioner is that a charge sheet was
filed against the respondents/accused for offences under Section
120B r/w 409, 477A IPC and under Sections 13(2) r/w 13(1)(c) of the
Prevention of Corruption Act, 1988 on the allegations that the
respondents while working as Catering Superintendents in VLR,
Central Station, Chennai had entered into a criminal conspiracy
during May, 1993 and in pursuance thereof, had misappropriated or
otherwise converted for their own use the provisions of stock of
Southern Railway, which were entrusted to them or were under their
domination, to the tune of Rs.1,11,808.05.

3. The further case of the petitioner is that so far the prosecution has examined its witnesses; that the prosecution then filed a petition under Section 311 Cr.P.C. for examination of four additional witnesses, namely S.Gopal, S.Thouladeen, S.F.Raziudeen and K.S.Somanathan to prove the entrustment of provisions to the respondents; that these witnesses are the authors of the records to be proved through them; that since the four witnesses are material witnesses and are available, the prosecution had sought the orders of the trial Court to examine them as additional witnesses; that the documents sought to be deposed by these witnesses are already in the court as part of the documents filed along with the charge sheet and therefore, no prejudice would be caused to the respondents/accused; that the learned Special Judge dismissed the said petition on 14.11.2003 on ground that the prosecution filed the petition at the fag end of the trial; that the witnesses sought to be examined were not examined during investigation by the Investigating Officer and the reason for not examining the witnesses during investigation was given by the Public Prosecutor and not by the Investigating Officer, since the Investigating Officer might have satisfied himself with the other witnesses cited in the list of witnesses to prove the entrustment. On such averments, he would pray for the relief extracted supra.

4. In the counter affidavit filed by the first respondent he would submit that so far in the case six witnesses were examined and the Investigating Officer's examination is going on and at this stage the prosecution has filed the above CrI.R.C. for the purpose of extending the trial and rebuilding the case; that among the four witnesses cited by the prosecution, one Gopal is already dead and the other two witnesses namely S.Thouladeen and S.F.Razindeen are already retired from service and their whereabouts are not known to the department and to procure them for the purpose of examination would cause delay in proceedings and the only one witness by name K.S.somanathan alone is working; that the above witnesses have not given statement under Section 161 of Cr.P.C. at the time when the investigation was on; that at the lapse of 10 years everything in their mind would be faded away and they cannot recollect anything at this fag end of trial due to senility; that moreover, the prosecution wants to bring them as witness for the purpose of filling up the lacuna caused during trial which will definitely prejudice the interest of the respondents/accused; that it also will not amount to be a fair trial on the part of the prosecution.

5. Heard the learned Special Public Prosecutor for C.B.I. appearing for the petitioner and the learned counsel appearing for the respondent as well and the materials placed on record have also been perused.

6. During arguments the learned Government Advocate appearing on behalf of the petitioner would cite a judgment reported in 2002 SCC (Cri)230 (Shailendra Kumar vs. State of Bihar and others) wherein it is held:

"Section 311 Cr.P.C. empowers the court to summon material witnesses though not summoned as witnesses and to examine or recall and re-examine if their evidence appears to it to be essential to the just decision of the case. Section 311 reveals that it is of a very wide amplitude and if there is any negligence, laches or mistakes by not examining material witnesses, the court's function to render just decision by examining such witnesses at any stage is not, in any way, impaired."

7. At this juncture the learned counsel for the respondents/accused would cite a judgment reported in 2001(4) SCC 759 (Rambhau and another vs. State of Maharashtra) wherein it is held:

"There is available a very wide discretion in the matter of obtaining additional evidence in terms of Section 391 of the Code of Criminal Procedure. But this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. However, it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code. Section 391 was introduced in the statute-book for the purpose of making it available to the court, not to fill up any gap in the prosecution case but to oversee that the concept of justice does not suffer."

8. The other judgment cited by the respondents/accused is one reported from 1997 10.D.N. Andhra Law Times wherein it is held:

"Criminal Procedure Code, 1973, Section 161 Statement of witnesses recorded by police and appreciation of evidence of such witnesses, it is not safe to accept evidence of witnesses whose statements were recorded by police under Section 161, Cr.P.C. four and half months after the incident for which delay no explanation is given by Investigating Officer"

Citing the above decision the learned counsel for the respondents would submit that in the case in hand there is a delay of more than 10 years in recording 161 statement and on this score only this Criminal Revision Case is liable to be dismissed and hence he would pray for dismissal of the above Criminal Revision Case.

9. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, what comes to be known is that in a case of misappropriation filed by the petitioner-prosecution having exhausted the opportunity afforded for it for examination of its witnesses, at the fag end of the trial it has filed a petition under Section 311 of Cr.P.C. for examination of four witnesses as additional evidence to prove the entrustment of the provisions with the respondents.

10. It would be argued on the part of the petitioner-prosecution that these four witnesses sought to be examined as additional evidence are the authors of the records which have to be proved before the Court and it should be done only through them and these witnesses are material witnesses. The further argument of the petitioner-prosecution is that since the documents which are sought to be marked through these witnesses are already forming part of the documents filed in the court along with the charge sheet and therefore, no prejudice would be caused to the accused in permitting the petitioner-prosecution to examine these witnesses as additional evidence.

11. On the other hand on the part of the respondent it would be argued that after the lapse of ten years the petitioner-prosecution has come forward to examine these witnesses as additional evidence as though at the time when they filed the charge sheet and the documents they were not aware of the situation, which cannot be proper ground and therefore, the learned special Judge has dismissed the said petition on ground that the prosecution has come forward seeking to examine these witnesses who have not been examined during investigation nor their statements recorded and the reasons for not examining the witnesses during the time of investigation has not also been given by the Investigating Officer but only by the Public Prosecutor who has nothing to do regarding the examination of witnesses and since the Investigating Officer has been satisfied himself with the witnesses cited in the list of witnesses to prove the entrustment it is not up to the Public Prosecutor now to come forward to say that what evidence was earlier collected are inconsistent and the Court should permit them to examine these witnesses as additional evidence.

12. In the above circumstances this Court is able to find that this is a case of misappropriation registered and it is a long pending case in which after a lapse of ten years, the petitioner-prosecution has come forward to take up the plea to examine these witnesses as additional evidence in spite of the witnesses who have been cited in the charge sheet being alive, with an excuse that they are not able to be procured, which is not a proper reason for examining these witnesses named anew in the petition as additional evidence and therefore on a careful perusal of the order of the trial Court which is impugned herein, this Court is not able to find any irregularity or error apparent on the face of the order nor could this Court see any other inconsistency or infirmity having crept into the order passed by the trial Court. Though as per the propositions held in the judgments cited supra that the Court could permit, if in its considered opinion the witnesses sought to be examined as additional evidence are material witnesses, in the case in hand it could not be permitted because those material witnesses who have been cited as witnesses in the charge sheet are still, available and instead of proving the case through them they are attempting to examine some other witnesses against whom they could wield undue influence as it comes to be argued on the part of the respondent and since there is sufficient force in the arguments of the learned counsel for the respondent, this Court has to only concur with the decision arrived at by the trial Court in not permitting the petitioner-prosecution to examine those witnesses as additional evidence, thus dismissing the application filed by the petitioner-prosecution. Since the order of the trial Court is a well considered and merited order, the interference of this Court sought to be made into the same is neither necessary nor warranted in the circumstance of the case and hence the following order:

In result,

(i) the above Criminal Revision Case does not merit acceptance and it becomes only liable to be dismissed and is dismissed accordingly;

(ii) the order dated 14.11.2003 made in CrI.M.P.No.381 of 2003 in C.C.No.40 of 1998 by the Court of Principal Special Judge for C.B.I. Cases, Chennai is confirmed.

21.12.2004.

gr

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Principal Special Judge for C.B.I. Cases, Chennai-104

2.The Public Prosecutor, High Court, Madras

3.The Inspector of Police, CHI/ACB/ Chennai.

1 cc to Mr.S.Raveendran, Advocate SR.56829

gm (co)

dv

CRL.R.C.NO.734 OF 2004



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